Supreme Court, U. S.
FILED
JAN 30 1975
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

No. 74-940

COLORADO RIVER WATER CONSERVATION DISTRICT, SOUTHWESTERN WATER CONSERVATION DISTRICT, BOARD OF WATER COMMISSIONERS, CITY AND COUNTY OF DENVER, COLORADO, SOUTHEASTERN WATER CONSERVANCY DISTRICT AND MANCOS WATER CONSERVANCY DISTRICT,
Petitioners

v.

UNITED STATES OF AMERICA, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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No. 74-

COLORADO RIVER WATER CONSERVATION DISTRICT, SOUTHWESTERN WATER CONSERVATION DISTRICT, BOARD OF WATER COMMISSIONERS, CITY AND COUNTY OF DENVER, COLORADO, SOUTHEASTERN WATER CONSERVANCY DISTRICT AND MANCOS WATER CONSERVANCY DISTRICT,
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UNITED STATES OF AMERICA, *Respondent.*

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The Colorado River Water Conservation District, the Southwestern Water Conservation District, the Board of Water Commissioners, City and County of Denver, Colorado, the Southeastern Water Conservancy District and the Mancos Water Conservancy District, five public agencies of the State of Colorado, respectfully pray that a writ of certiorari issue to re-

view a judgment of the United States Court of Appeals for the Tenth Circuit entered October 2, 1974.[1]

OPINIONS BELOW

The opinion of the Court of Appeals for the Tenth Circuit is reported at 504 F. 2d 115 and appears as *Appendix A* hereto. A copy of the transcript of the orally issued findings of fact, conclusions of law and order of the United States District Court for the District of Colorado appears as *Appendix B* hereto.

JURISDICTION

The judgment of the court of appeals in this case was entered on October 2, 1974. A timely petition for rehearing and suggestion for rehearing *en banc* by the petitioners and others was denied on November 12, 1974.[2] The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

While subjecting all of its claims to water (including appropriative and reserved rights) to adjudication in the state water courts in three of Colorado's seven water divisions following this Court's March

[1] The initial action below was captioned *United States of America* v. *Mary Akin, et al.* and was brought against some 1,200 named Colorado citzens as well as "all unknown claimants" alleged to be using waters of the San Juan River and its tributaries in Colorado. In addition to your petitioners herein, intervening defendants include the State of Colorado on behalf of the State Board of Agriculture and the Colorado Game and Fish Commission. It is anticipated that one or more similar petitions for certiorari will be filed on behalf of some of these as well as other intervening defendants.

[2] Circuit Judges Holloway and Barrett would have granted an *en banc* hearing.

1971 opinions in *Eagle County* [3] and *Water Division 5*,[4] the United States in November 1972 instituted a suit in the United States District Court in Denver against some 1200 named water users and unnamed others, seeking to have declared and determined all of its claims to the use of water in the San Juan River basin (within Water Division 7), including claims as trustee for two Indian reservations. Shortly thereafter the United States, having been served in Water Division 7 under the McCarran Amendment (43 U.S.C. § 666), submitted for adjudication in the state proceedings all of its claims to the use of water on the Dolores River and its tributaries in Water Division 7, but failed to submit those tendered in the U. S. District Court. The District Court granted a motion to dismiss the United States on grounds of abstention or by comity. In these circumstances:

1. Did the District Court properly exercise its discretion in invoking the abstention and comity principles?
2. Did Congress intend in the McCarran Amendment that general water rights adjudications, such as involved here, be conducted in state proceedings?

[3] *U.S.* v. *District Court in and for the County of Eagle, State of Colorado, et al.*, 401 U.S. 520 (1971).

[4] *U.S.* v. *District Court in and for Water Division No. 5, State of Colorado, and the Judge thereof, the Honorable Clifford H. Darrow, and the Water Referee thereof*, 401 U.S. 527 (1971).

STATUTES INVOLVED

The immediate federal statutory provision involved is 43 U.S.C. § 666, 66 Stat. 560, commonly referred to as the McCarran Amendment, which provides:

> § 666. Suits for adjudication of water rights—
>
> *Joinder of the United States as defendant; costs*
>
> (a) Consent is given to join the United States as a defendant in any suit (1) for the adjudication of rights to the use of water of a river system or other source, or (2) for the administration of such rights, where it appears that the United States is the owner of or is in the process of acquiring water rights by appropriation under State law, by purchase, by exchange, or otherwise, and the United States is a necessary party to such suit. The United States, when a party to any such suit, shall (1) be deemed to have waived any right to plead that the State laws are inapplicable or that the United States is not amenable thereto by reason of its sovereignty, and (2) shall be subject to the judgments, orders, and decrees of the court having jurisdiction and may obtain review thereof, in the same manner and to the same extent as a private individual under like circumstances: *Provided,* that no judgment for costs shall be entered against the United States in any such suit.
>
> *Service of Summons*
>
> (b) Summons or other process in any such suit shall be served upon the Attorney General or his designated representative.
>
> *Joinder in suits involving use of interstate streams by State*
>
> (c) Nothing in this section shall be construed as authorizing the joinder of the United States in any suit or controversy in the Supreme Court of the United States involving the right of States to the use of the water of any interstate stream. July 10, 1952, c. 651, Title II, § 208(a)-(c), 66 Stat. 560.

Also involved is the Water Rights Determination and Administration Act of 1969, Colorado Revised Statutes (1963), § 148-21-1 et seq., (as amended) commonly called the 1969 Act, which provides a system for the adjudication of the waters of the natural streams in the State of Colorado.

Both statutes were construed by this Court in *Eagle County* and *Water Division 5.*

STATEMENT

The United States instituted this action on November 14, 1972, in the United States District Court for the District of Colorado [5] seeking to have declared and determined against some 1200 named defendants and unknown others all of its claims to the use of the waters of the San Juan River and its tributaries in Colorado. The San Juan and its tributaries are a part of the Colorado River system. The U. S. claims include claimed appropriative rights under state law as well as reserved rights. Among the reserved rights asserted are those for use in connection with Mesa Verde National Park, the Yucca House and Hovenweep National Monuments, and the San Juan National Forest. Claims to appropriative rights include those for Bu-

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[5] A copy of the complaint is attached hereto as *Appendix C.* Jurisdiction was asserted under 28 U.S.C. 1345, which provides in pertinent part:

> *Except* as otherwise provided by Act of Congress, the district courts shall have original jurisdiction of all civil actions, suits or proceedings commenced by the United States . . . (emphasis supplied).

reau of Reclamation projects along the San Juan and for other lands administered by the Bureau of Land Management in the area. Also, for itself and on behalf of the Indian tribes, the United States claimed reserved rights for use in connection with the Ute Mountain Ute and Southern Ute Indian Reservations. The extent and location of all of these claims, however, are totally undefined.

As this Court may recall from its consideration in 1971 of *Eagle County* and *Water Division 5,* companion cases involving Colorado water law and Government claims to waters within that State, as a consequence of the 1969 Act the State is now divided into seven water divisions. The litigation sought to be reviewed here relates to claims in only the San Juan basin in Water Division 7.[6]

When it brought this suit in the U. S. District Court in Denver, the United States was then and still is participating in proceedings in Water Divisions 4, 5 and 6, as well as in former Water Districts 36, 37, 51 and 52. The Government's participation in those proceedings followed this Court's unanimous opinions in *Eagle County* and *Water Division 5* holding that § 666 subjected all U. S. claims, including those to reserved rights, to the state adjudicatory proceedings. When

[6]The principal tributaries of the Colorado River in the Colorado River Basin originate within Colorado and the annual average outflow from the state amounts to some 80% of the river's flow at Lee Ferry, the gauging station between the Upper and Lower Basins under the Colorado River Compact of 1922 (see *Arizona* v. *California*, 373 U.S. 546 (1963)). Though the San Juan River Basin is by no means the largest contributing source, its proper administration with relation to other Colorado contributor tributaries is critical in the administration of water uses on all of the streams in Colorado naturally draining to Lee Ferry.

state proceedings were instituted in Water Division 7 on January 3, 1973, however, the United States failed to file the claims it had asserted in the federal court in Denver and instead filed water claims only as to the Dolores River drainage,[7] a separate stream system within Water Division 7, on which it alleged it had claims which had not been made in the federal court. A map of Water Division 7 showing the principal drainage areas is attached as *Appendix D.* The Government's claims to water rights in the pending state proceedings are identical to those now being made by the Government in the federal district court, save that the claims in Denver include reserved rights for the two Indian reservations.

Upon reviewing all of these circumstances the district court granted a motion to dismiss. The court found that Colorado had a well defined, workable system for water adjudication; that the Government under *Eagle County* and *Water Division 5* was not immune from suit; that the Government was pursuing all of its claims in Water Divisions 4, 5 and 6 and had been served in 7; and that while § 666, *Eagle County* and *Water Division 5* might not require exclusive jurisdiction in state courts (App. B, p. 19a):

> . . . they nonetheless point to our satisfaction that deferral of jurisdiction to state courts is justified when, as a practical matter, retention of federal

[7] Included as a part of the claims in the state water court proceeding in Water Divsion 7 are those made in connection with that part of the San Juan National Forest in the Dolores River drainage. Thus the Government proposes to split the adjudication of claims in connection with that Forest between the water court in Water Division 7 and the federal court in Denver, forums over 300 airline miles apart.

jurisdiction on some claims would result in a piecemeal solution of a larger problem.

The district court was further concerned with the dual system of decrees which would result and the possibility of conflicts eventually requiring additional litigation; considered it would be an unreasonable burden on the 1200 to 1500 citizens who had proximity to the state court but not to the federal court in Denver; saw the state court as having the same obligation to enforce federal law as well as having a considerable expertise in questions of water law which had been a hundred years in development; and concluded that federal jurisdiction should be withheld on the principles of abstention and of comity (App. B, p. 20a):

> . . . [as the state forum] can fully and adequately adjudicate the issues . . . be they the national forests, the indian tribes, or any other individual litigants. To this end the court is granting the defendants' Motion to Dismiss.

The Government appealed to the Tenth Circuit. That court recognized that the dismissal below was on the ground of the abstention doctrine and for reasons of comity. The circuit, however, viewing the decision to abstain as the primary issue, said that this Court, *inter alia,* had not held or even suggested in *Eagle County* and *Water Division 5* that abstention be ordered and reversed the judgment below.

REASONS FOR GRANTING THE WRIT

It is important that this Court determine now whether the district court soundly exercised its discretion in abstaining from hearing the U.S. claims of water rights involved here. The court of appeals adopted an overly narrow view of abstention, and without making any reference to the principles of comity or finding any abuse of discretion by the district court, substituted its own opinion and reversed.

As a consequence there is presented the spectacle of the federal district court and the state water courts considering simultaneously the same factual and legal issues dealing with claims to the use of water. There is no question that the state water courts can do this more efficiently, not to mention the relief accorded the federal courts through being released from extended and burdensome litigation. In addition the result from the state proceedings will present a complete decision and avoid a piecemeal solution. As was the case in *Kaiser Steel Corp.* v. *W. S. Ranch Co.*, 391 U.S. 593 (1968), sound judicial administration requires abstention here.

Present Colorado water users are faced with insurmountable problems of relitigating in federal court water rights in some cases over one hundred years in decree (if they have the available proof). Ironically, in spite of the Government's insistence to place this burden on the Colorado citizenry, the United States cannot, under the procedure chosen, achieve the relief to which it should be entitled.

Nor is there any doubt whatsoever since this Court's rulings in *Eagle County* and *Water Division 5* that the state courts have complete jurisdiction of *all* federal claims to the use of water, whether they involve appropriative rights, riparian rights or reserved rights. As this Court noted in those cases, if there is a collision between any rights of the litigants and the reserved rights, the federal question can be preserved in the state decision and brought here for review.

Indeed, the reasons of sound judicial administration—to permit established state procedures to work in a specialized field—and the availability of review here should any complaint remain, are so strong and compelling as to call for the exercise of this Court's power of supervision, as in *Kaiser,* through summary reversal.

1. Sound judicial administration requires affirmance of the District Court's exercise of its discretion to abstain.

The practical problems which result from the action of the Tenth Circuit in reversing are formidable and not in the interests of sound judicial administration. That court perceived the meaning of the abstention principle by noting (App. A, p. 10a):

> . . . [it] is that federal courts in the exercise of a wise discretion are to restrain their authority because of scrupulous regard for the rightful independence of the state governments and for the smooth working of the Federal Judiciary. *Railroad Commission of Texas* v. *Pullman Co.,* 312 U.S. 496 (1941).

But the circuit then failed to apply the principle by not recognizing, or even commenting upon, the practical ingredients which led to the exercise of a wise discretion by the district court.

The practicalities of the situation were emphasized by the district court in reaching its result. Note was taken of the fact that the United States had already filed like claims in Divisions 4, 5 and 6 and had been served in Division 7. The court then observed (App. B, p. 19a):

> . . . a *practical* approach must recognize that we would be creating a dual system of administration

> and decrees of water rights and potentially could require water users needlessly to readjudicate rights already decreed under state law (emphasis supplied).

The district court further noted (App. B, pp. 19a-20a):

> . . . water users have proximity to state courts and from a distance factor alone there are *practical* impediments to requiring everyone in this particular area to litigate the matter in the federal courts.
>
> Further the Court is satisfied from a *practical* approach that this would be perhaps an unreasonable burden placed upon the citizens of Colorado . . . (emphasis supplied).

The district court adverted again to the state mechanism which was already functioning on like federal claims (App. B, p. 20a):

> . . . [In] attempting to locate individual water rights . . . the forums that are established through the state are recognized as a workable network of administration with considerable expertise under a body of state law that has been a hundred years in development and perhaps the system of priorities and propositions runs parallel to the history of the state and in fact is engrained in the Colorado Constitution. The court can see no *practical* argument in having or persuasive argument in having another forum exercise jurisdiction (emphasis supplied).

Thus the district court with all of these considerations in mind, and familiar with the history of the McCarran Amendment and this Court's *Eagle* and *Water Division 5* opinions, held that (App. B, p. 19a):

> . . . deferral of jurisdiction to state courts is justified when, as a *practical matter,* retention of

federal jurisdiction on some claims would result in a piecemeal solution of a larger problem (emphasis supplied).

There are other very important practical concerns calling for reversal of the judgment below which were not elaborated upon by either the district or circuit court. Chief among these is the unlikelihood that the United States can obtain the desired relief due to the fact that there is no federal system for the adjudication and administration of water rights comparable to the state system. For example, in the state proceedings notice to all is given by publication. Those having previously adjudicated rights considered not to be endangered by other claims whether local or federal have the option of not appearing without consequent or at least recognizable effect on the quality or validity of their decrees. This contrasts sharply with the proceeding instituted by the United States below where the Government asks for an order requiring all defendant claimants, named *and unknown,* to appear and establish their claims[8] to use water in the affected area with no notice whatsoever to the unknown claimants. As far as the named defendants are concerned, all probably have decrees, many entered before the turn of the century, from a state court. The problems of producing evidence of rights may be insurmountable for many of them.

In addition, the realities of the interstate water user picture make it apparent that any water decree rendered in the district court would not be fully effec-

[8] See Prayer, para. 1, Appendix C 36a-37a.

tive. The western slope of Colorado contains the headwaters of the major streams and rivers which are all tributary to the Colorado River, many of which join the Colorado River after they have passed the state boundaries. Nonetheless, the Colorado River and all its tributaries have been made into an integrated system for the purposes of water allocation and administration by a series of interstate agreements.[9] The share allotted to each state by these Compacts is divided among the users within a state by the procedures existing within each state for the adjudication and distribution of water. The water burden each state must absorb includes, of course, the claims of the United States in such state.

There are in the Colorado River drainage in Colorado, apart from the San Juan Basin and exclusive of the claims of the United States, something in excess of 10,000 water rights. Since the compacts provide no stream by stream allocation of the share of water to which Colorado users are entitled, it is evident that the effect of the requested water rights is not confined to the tributary drainages in which the requested rights are located. Under state procedures, interested parties outside of the water division in-

[9] The Colorado River Compact of 1922 approved by the Congress in 1929 in the Boulder Canyon Project Act, 45 Stat. 1057, 1064 and which was declared effective by Presidential Proclamation, 46 Stat. 3000 (see also 7 Colo. Rev. Stat. 658 (149-2-1 C.R.S. 1963)) apportions the total flow of the Colorado River between the Upper Basin, (principally, the states of Colorado, New Mexico, Utah and Wyoming) and the Lower Basin, (principally, Arizona, California and Nevada). The Upper Colorado River Basin Compact of 1948, approved by the Congress in 1949, 63 Stat. 31 (see also 7 Colo. Rev. Stat. 695 (149-8-1 C.R.S. 1963), divides the waters apportioned by the 1922 Compact among the Upper Basin states.

volved are also given sufficient notice by publication, are entitled to appear, and, appearing, are bound by the results unless, not having received notice, they appear before the limitation period expires.[10] But under the procedure chosen by the United States here, the Colorado River users located in Colorado but not named will not receive notice and consequently will not be bound. If the United States is allowed to proceed with its case, the obtaining of a piecemeal water right solution which is effective against some users, but which may not be effective against others, would throw the statewide administrative mechanism into chaos.[11]

The district court sought to avoid this evident quagmire ". . . for a totality of the reasons expressed under the doctrine of abstention or by comity." The circuit, while agreeing that state courts did have jurisdiction, ignored comity and without making any reference to the practical concerns of the district judge, chose a frankly "narrow scope" (App. A, p. 10a) to review and reverse the discretion exercised.

Suffice it to say, contrary to the opinion of the circuit, the claims of the United States obviously present state questions on appropriative rights identical with those already under adjudication in the state water courts so that *Railroad Commission of Texas* v. *Pullman,* 312 U.S. 496 (1941) cannot be lightly dismissed; that a

[10] Colo. Rev. Stat. (1963) 148-21-20(10), (as amended) limits the period when an adversely affected person may petition the court for redress to three (3) years.

[11] The United States also asks for an order enjoining all uses of water except in accordance with the decree to be ultimately entered, and for the appointment of a Water Master to administer the decree. The additional unnecessary layer that this would impose and the potential for endless conflict between these layers in the same area of the state should certainly be avoided.

state regulatory scheme could not be more clearly involved, so that the rule of *Burford* v. *Sun Oil Co.,* 319 U.S. 315 (1943) should have been given greater consideration[12]; and that where all of the questions involve water, a matter of vital concern as one of the most valuable natural resources of the arid west, this Court's approach in *Kaiser Steel Corp.* v. *W. S. Ranch Co.* would have been appropriate.[13]

The practical considerations so important to the district court's staying of its hand equate perfectly to the "special circumstances" which justify application of the principles of comity and abstention. Thus, if the pendency of claims of an identical nature in current state proceedings[14]; if the avoidance of a piecemeal solution to a broad vital problem involving a precious natural resource; if the transporting of hundreds of citizens to a removed forum in lieu of their own courthouse, to engage in an imperfect procedure, often with the practical inability to call long dead witnesses to reprove a valid priority of right; if the disruption of a long evolved state procedure for the orderly, equitable administration of this vital resource—if all these are

[12] Nor should the avoidance of needless friction or unseemly conflict between officials or sovereignties as in *Louisiana Power & Light Co.* v. *City of Thibodaux,* 360 U.S. 25 (1959), and *Martin* v. *Creasy,* 360 U.S. 219 (1959), be disregarded. See also *Allegheny Airlines, Inc.* v. *Pennsylvania P.U.C.,* 465 F.2d 237, (3d Cir. 1972), *cert. denied,* 410 U.S. 943 (1973).

[13] In view of the existing proceedings in the state courts and the availabilty of review here should the United States have any complaint following the state proceedings, the retention of jurisdiction deemed desirable in the particular circumstances of *Kaiser* is not required here.

[14] The division of the adjudication of United States water rights in the San Juan National Forest is but one example.

not circumstances justifying the staying of the federal hand, whether it be called abstention or comity, those doctrines will never be applicable.

2. The authority of the state courts to adjudicate *all* water claims of the U.S., whether appropriative, riparian, or reserved, is clear.

As has heretofore been noted, this Court in *Eagle County* and *Water Division 5* unanimously determined the propriety and capability of state water courts determining and adjudicating all federal claims to the use of water within a state, howsoever those rights may have come into existence. Neither case admits or suggests any exception to this jurisdiction. The cases note that relief from error, if any, committed by the state courts, is available to the United States in this Court.

In *Eagle County* and *Water Division 5* the Government, citing among other cases *Winters* v. *U.S.*, 207 U.S. 564 (1908), and *Arizona* v. *California,* 373 U.S. 546 (1963), acknowledged that the doctrine of the implied reservation of waters upon the establishment of an Indian reservation found its genesis in *Winters* and was extended in *Arizona* v. *California* to other types of reservations. The Government did not, however, in the 1971 cases, make any attempt to differentiate as to jurisdiction between the variety of claimed reserved rights. Now by an attempted reversal of field, the Government seeks to keep its myriad claims before the federal court relying on supposed exclusive federal jurisdiction of its claims for Indian reservations. The Government rests its argument that this case must be tried in federal court on a footnote in its opening brief in

Water Division 5 with respect to claims for Indian lands.[15]

We believe this reliance to be misplaced for four principal reasons. First, the footnote followed reference to the Government's brief in *Eagle County* in which was made a detailed recitation of the magnitude of reserved rights, including specific reference to their claims to the reservations of water for Indian lands.

Second, their claims made below, in addition to the Indian claims, include all federal claims in the San Juan River Basin in Colorado,[16] appropriative as well as reserved, including national forests, parks, and the like. It is thus clear the Government seeks to make nugatory the results of *Eagle County* and *Water Division 5,* and effectively repeal the McCarran Amendment by filing first in federal court blanketing therein all Federal claims, appropriative as well as reserved, under the cover of the alleged exclusive federal jurisdiction over their Indian claims.

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[15] Fn. 3, p. 10, as follows:

> To the best of our knowledge, none of the reserved water rights claimed by the United States in Water Division 5 relate to Indian lands. In the event that this Court should rule that 43 U.S.C. § 666 subjects Federal reserved rights in general to state adjudication, there would remain the further question (not presented by this case) whether the consent statute covers water rights held by the United States in trust for specific Indian tribes—frequently pursuant to treaty—rather than for the benefit of the general public.

Additionally, the Government again contends that its claims for Indian lands will not be dealt with justly in state courts. Such contention was completely rejected by this Court in *Eagle County and Water Division 5.*

[16] See Appendix C.

Third, events subsequent to the decisions in *Eagle County* and *Water Division 5,* including a filing in those cases by one Indian tribe in this Court [17], would indicate that those decisions intended the adjudication of all federal reserved water rights be in the state courts under state procedures. Extensive hearings were held by a subcommittee of the Committee on the Judiciary, United States Senate, on all Indian rights, where Justice Department witnesses, while relying heavily on the aforementioned *Water Division 5* footnote, suggested the surest resolution of the problem was Congressional action amending § 666 to grant a right of removal to the Government.[18] No such Congressional action has been taken.

It seems clear that this Court, in those two decisions in 1971, was attempting, by interpreting the McCarran Amendment to mean what it so clearly says, to eliminate the perplexities and conflicts of apparent duality of jurisdiction over water adjudication matters.[19]

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[17] Suggestion of Interest of The Fort Mojave Tribe of Indians and Points and Authorities in Support Thereof. This filing was rejected, 401 U.S. 940 (1971).

[18] Hearings before the Subcommittee on Administrative Practice and Procedure of the Committee on the Judiciary, U.S. Senate, 92d Cong., 1st Sess. (1971-72) in seven parts. See particularly Pt. 1, pp. 13, 14, 25 and 32.

[19] One case in Colorado, filed in 1949 (pre-McCarran Amendment days), in decree in 1955, supplemental decree in 1964, is yet the subject of contention and strife in federal court with no end in sight. *United States* v. *Northern Colorado Water Conservancy District, et al.,* Consolidated cases, Nos. 2187, 5016, 5017. The result of this pre-McCarran assumption of jurisdiction involved removal of two state court adjudications, proof of diligence in completion of appropriations in two forums, confusion as to who is involved and who is bound, and considerable uncertainty as to who got decrees for what. Only recently, the Court of Appeals for the Tenth Circuit, in an unpublished opinion (No. 73-1300), was required to decide a question easily disposed of, had the matter been in state court under state procedures.

Fourth, this Court made it unequivocally clear in *Eagle County* and *Water Division 5* that all claims of all parties however derived and irrespective of the use to which the water might be put, were to be adjudicated in the state court proceeding.

This Court said in *Eagle County,* in disposing of the argument that § 666 did not cover reserved water rights, at p. 524:

> . . . We reject that conclusion for we deal with an all-inclusive statute concerning "the adjudication of rights to the use of water of a river system" which in §666 (a)(1) has no exceptions and which, as we read it, includes appropriative rights, riparian rights, and reserved rights.

And further at p. 525:

> . . . This proceeding, unlike the one in *Dugan,* is not a private one to determine whether named claimants have priority over the United States. The whole community of claims is involved . . . .

And, similarly, in *Water Division 5,* this Court said, at p. 529-30:

> . . . The present suit, like the one in the *Eagle County* case, reaches all claims, perhaps month by month but inclusively in the totality; and, as we said in the other case, if there is a collision between prior adjudicated rights and reserved rights of the United States, the federal questions can be preserved in the state decision and brought here for review.

CONCLUSION

For the foregoing reasons petitioners respectfully urge this Court act to the end that the clarity and simplicity brought to water adjudication and administrative problems in appropriation states by this Courts' decisions in *Eagle County* and *Water Division No. 5* should not be nullified by the decision below. The petition for a writ of certiorari should be granted and the judgment of the court of appeals reversed.

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS,
TENTH CIRCUIT.

No. 73-1807.

UNITED STATES OF AMERICA, *Plaintiff-Appellant,*

v.

MARY AKIN *et al., Defendants-Appellees.*

Submitted Aug. 19, 1974.

Decided Oct. 2, 1974.

Rehearing Denied Nov. 12, 1974.

United States brought action, in its own behalf and on behalf of two Indian tribes, for adjudication of reserved water rights in the San Juan Basin. Parties which had intervened as defendants filed state court action involving the same subject matter. The District Court for the District of Colorado, Sherman G. Finesilver, J., abstained and United States appealed. The Court of Appeals, William E. Doyle, Circuit Judge, held that statute which allows United States to be joined in state court action brought to determine water rights, did not preclude United States district court from exercising jurisdiction over action brought by the United States involving water rights; and that the district court should not have abstained.

Reversed and remanded.

Walter Kiechel, Jr., Deputy Asst. Atty. Gen. (Wallace H. Johnson, Asst. Atty. Gen., and Edmund B. Clarke, Donald W. Redd, and Lawrence E. Shearer, Attys., Dept. of Justice, Washington, D. C., on the brief), for plaintiff-appellant.

John E. Bush, Deputy Atty. Gen. (John P. Moore, Atty. Gen., Clyde O. Martz, Raphael J. Moses, and James D. Geissinger, Special Asst. Attys. Gen., on the brief), for defendants-appellees The State Board of Agriculture and

The Colorado Game and Fish Commission (Colorado Wildlife Commission and Colorado Board of Parks and Outdoor Recreation).

L. W. McDaniel, Durango, Colo., on the brief for defendant-appellee Southwestern Water Conservancy District.

Fairfield & Woods and Ireland, Stapleton, Pryor & Holmes, P. C., Denver, Colo., on the brief, for defendant-appellee Mancos Water Conservancy District.

Fairfield & Woods, Denver, Colo., on the brief for defendant-appellee Southeastern Colorado Water Conservancy District.

Kenneth Balcomb, Glenwood Springs, Colo., for intervenor-appellee Colorado River Water Conservation District.

Thomas W. Fredericks, David H. Getches and Robert S. Pelcyger, Attys., Native American Rights Fund, Boulder, Colo., on the brief of amici curiae Southern Ute Indian Tribe, Ute Mountain Ute Indian Tribe and National Tribal Chairmen's Association.

George L. Zoellner, Kenneth L. Broadhurst, Glenn Saunders, Special Counsel and Jack Ross, Special Counsel, Denver, Colo., on the brief, for defendant-appellee City and County of Denver, acting by and through its Board of Water Commissioners.

Before HILL and DOYLE, Circuit Judges, and TALBOT SMITH*, District Judge.

WILLIAM E. DOYLE, Circuit Judge.

The questions presented in this appeal are, first, whether or not the District Court had jurisdiction to entertain this action which was instituted by the United States on its own

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* Honorable Talbot Smith, United States District Judge, Ann Arbor, Michigan sitting by designation.

behalf and on behalf of certain Indian tribes, or, secondly, assuming that the District Court had jurisdiction, whether the court should have abstained.

This is a water rights case which was instituted by the United States in the United States District Court for the District of Colorado. The action was brought on behalf of the United States and on behalf of the Ute Mountain and Southern Ute Indian Tribes on November 14, 1972. It sought the adjudication of all water rights held by the United States in its own right and as trustee for the Ute Mountain and Southern Ute Indian Tribes in the San Juan Basin but, particularly, adjudication of all of its reserved rights in the San Juan River of Colorado. There are approximately 1200 named defendants.

The reserved rights asserted by the United States consist of those used in connection with Mesa Verde National Park, the Yucca House National Monument, the Hovenweep National Monument, Bureau of Reclamation projects within the State of Colorado and lands reserved by the United States in Colorado. On behalf of the Indian tribes the United States claims further reserved rights for use of the Ute Mountain Ute Tribe and the Southern Utes on their reservations. The Colorado River Water Conservation District intervened as a defendant for the purpose of filing a motion to dismiss. Other intervenors followed including the Southeastern Colorado Water Conservancy District and the Board of Water Commissioners, City and County of Denver.

A subsequent suit was filed on January 3, 1973 in State Court by the Mancos Water Conservation District and the Southeastern Colorado Water Conservancy District embracing similar subject matter.** In this action the plain-

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** It has been called to our attention in an informal letter from one of the attorneys for defendants-appellees that this statement is incorrect. It is said that on that date Southwestern Colorado Water Conservation District filed a motion for the joinder of the United States under the McCarran Act. The record does not reveal the true fact. We note the suggested correction, even though it is not outcome determinative.

tiffs sought judicial determination of the identical water rights which the United States sought to have adjudicated. The United States was joined as a defendant in the state action pursuant to the so-called McCarran Amendment, 43 U.S.C. § 666, which allows a joinder of the United States in such a suit in state court.

The United States District Court's dismissal of the action was on the ground of the abstention doctrine and for reasons of "comity." In effect, therefore, the court's assumption was that it had jurisdiction.

Thus, the primary issue is whether the trial court erred in its decision to abstain. Inasmuch as the defendants-appellees also contend that the District Court lacked jurisdiction to hear the case, we shall take up that issue also.

I.

The Jurisdiction Question

The United States has alleged that jurisdiction in District Court was conferred by 28 U.S.C. § 1345 which gives to district courts original jurisdiction of all civil actions commenced by the United States except as otherwise provided.

The Colorado River Water Conservation District takes the position that 43 U.S.C. § 666, the McCarran Amendment, which gives consent to joinder of the United States "in any suit for the adjudication of rights to the use of water," etc.,[1] not only gives a state court jurisdiction over

[1] The full context of this section reads as follows:

> Consent is given to join the United States as a defendant in any suit (1) for the adjudication of rights to the use of water of a river system or other source, or (2) for the administration of such rights, where it appears that the United States is the owner of or is in the process of acquiring water rights by appropriation under State law, by purchase, by exchange, or otherwise, and the United States is a necessary party to such suit. The United States, when a party to any such suit, shall (1) be deemed to have waived any right to plead that the State laws are inapplicable or that the United States is not amenable thereto by reason of its sovereignty, and (2) shall be subject to the judgments, orders, and decrees of the court having jurisdiction, and may obtain review thereof, in the same manner and to the same extent as a private individual under like circumstances: *Provided*, That no judgment for costs shall be entered against the United States in any such suit.

the United States, it also, according to their further argument, excludes federal courts from assuming jurisdiction. We disagree.

The starting point in this analysis is Article III of the United States Constitution which extends the judicial power to controversies to which the United States shall be a party. Although this provision is not self-implementing, it does evidence the intention of the Framers to allow the United States to sue in its own courts. The statute, § 1345, *supra*, confirms this right of the United States.[2]

The rationale for the right of the United States to sue in federal court is expressed by Mr. Justice Story in his work, Story, The Constitution § 1674:

> It would be a perfect novelty in the history of national jurisprudence, as well as of public law, that a sovereign had no authority to sue in his own courts. Unless this power were given to the United States, the enforcement of all their rights, powers, contracts and privi-

[2] Section 1345, *supra*, provides:

> § 1345. United States as plaintiff
>
> Except as otherwise provided by Act of Congress, the district courts shall have original jurisdiction of all civil actions, suits or proceedings commenced by the United States, or by any agency or officer thereof expressly authorized to sue by Act of Congress.

leges in their sovereign capacity would be at the mercy of the states.

The right was recognized from the earliest days in our history. The Judiciary Act of 1789 gave the district courts jurisdiction concurrent with that of the state courts "of all suits at common law where the United States shall sue." This Act also gave the circuit courts jurisdiction "of all suits of a civil nature at common law or in equity," subject to a jurisdictional amount. The clear right of the United States to maintain actions asserting proprietary rights is discussed in H. M. Hart & H. Wechsler, The Federal Courts and The Federal System (2d ed. 1973), at 1301-09. The authors cite Cotton v. United States, 11 How. 229, 13 L.Ed. 675 (1850) as an example of the right of the United States to bring an action even without an authorizing statute. That was a trespass case.

With respect to the cases in which the government asserts a proprietary right, the authors say:

> The most striking recent examples of the assertion of proprietary rights of the United States, illustrating the magnitude of the interests that may be involved, were the much-disputed tidelands cases. Compare the motion of the United States for leave to intervene in Nebraska v. Wyoming, 304 U.S. 545 [58 S.Ct. 1035, 82 L.Ed. 1519] (1938). See Comment, Federal Ownership of Inland Waters: The Fallbrook Case, 31 Tex.L.Rev. 404 (1953). See also the cases growing out of the oil scandals of the Harding administration. Pan American Petroleum & Transport Co. v. United States, 273 U.S. 456 [47 S.Ct. 416, 71 L.Ed. 734] (1927); Mammoth Oil Co. v. United States, 275 U.S. 13 [48 S.Ct. 1, 72 L.Ed. 137] (1927).
>
> Closely related to the proprietary cases are those in which the United States has established its status as guardian of the Indian tribes and its standing in litiga-

> tion to vindicate Indian rights. See, *e.g.*, Heckman v. United States, 224 U.S. 413 [32 S.Ct. 424, 56 L.Ed. 820] (1912); United States v. Board of Comm'rs of Osage County, 251 U.S. 128 [40 S.Ct. 100, 64 L.Ed. 184] (1919); Cummings & McFarland, Federal Justice 250-317, 384-413 (1937).

H. M. Hart & H. Wechsler, The Federal Courts and The Federal System (2d ed. 1973), at 1302.

The McCarran Amendment does not express an intention that the United States shall utilize state courts for the purpose of litigating its claims to water. It is said by appellees that the original language of the Amendment contained a proviso which allowed the United States to remove to federal court any action in which it was a defendant within the scope of the waiver of sovereign immunity contained in the Amendment. The argument continues that since Congress dropped this proviso it follows that Congress intended to deprive the United States of its right to sue under § 1345. We disagree with the conclusion drawn. The McCarran Amendment merely allowed the United States to be *joined* in a state action in a case in which the United States own water rights and is a necessary party to the suit. However, this falls short of furnishing by implication a repeal of § 1345 applicable to water cases. The Amendment's purpose was to permit complete adjudication in a state court action and to prevent frustration of the parties because of inability to obtain jurisdiction over the United States. So, elimination of the removal proviso originally in the Amendment at most expressed congressional intent that where the United States is joined under the circumstances set forth in the Amendment it will not be allowed to frustrate the procedures in the state court. But the statute did not prohibit the United States from ever removing a water rights case to the federal court. If Congress had intended to force the United States to litigate its water cases in state courts, it could have done so by creating a water rights

exception to § 1345. This it did not do either expressly or impliedly.[3]

The decisions in United States v. District Court, County of Eagle, Colorado, 401 U.S. 520, 525, 91 S.Ct. 998, 28 L.Ed. 2d 278 (1971) and United States v. District Court, Water Division No. 5, Colo., 401 U.S. 527, 91 S.Ct. 1003, 28 L.Ed. 2d 284 (1971) do not support the appellees in their present contentions. The issue in both of these was whether the consent to suit of the United States by provision of the McCarran Amendment extended to reserved rights. The Supreme Court held that the Amendment did include this type of right and it followed that the United States could be joined as a *defendant* in a state water rights proceeding. But by so holding the Court did not impliedly say that the United States was prohibited from litigating its reserved water rights as a plaintiff in federal court. At most, it held that the McCarran Amendment authorized a concurrent jurisdiction with state courts to try federal water rights cases—concurrent with the jurisdiction of the federal courts under § 1345, *supra*. This is far different from appellees' position that the Amendment prohibits the United States' litigation of these rights in federal court.

Nor does the decision of the United States District Court for the District of Utah in In re Green River Drainage

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[3] Senator McCarran himself stated that:

> S.18 is not intended . . . to be used for any other purpose than to allow the United States to be joined in a suit wherein it is necessary to adjudicate all of the rights of various owners on a given stream. This is so because unless all of the parties owning or in the process of acquiring water rights on a particular stream can be joined as parties defendant, any subsequent decree would be of little value.

S.Rep.No. 755, 82d Cong., 1st Sess., at 9. *See also* United States v. District Court, County of Eagle, Colorado, 401 U.S. 520, 525, 91 S.Ct. 998, 28 L.Ed. 2d 278 (1971); Dugan v. Rank, 372 U.S. 609, 83 S.Ct. 999, 10 L.Ed.2d 15 (1963); Nevada ex rel. Shamberger v. United States, 279 F.2d 699 (9th Cir. 1960).

Area, 147 F.Supp. 127 (D.Utah 1956) support appellees. This was a removal problem wherein the court held that the United States cannot automatically remove its water rights cases to federal court. The court conceded that the McCarran Amendment does not preclude such removal if it would otherwise be removable.

The Supreme Court in Dugan v. Rank, 372 U.S. 609, 83 S.Ct. 999, 10 L.Ed.2d 15 (1963) considered a situation in which the United States was joined as a defendant in a private suit to determine water rights solely between certain private claimants and the United States. The Court held that the McCarran Amendment was not intended to apply to a private suit between the United States and a private party to determine conflicting water rights contentions.

We must then reject the notion that the McCarran Amendment partially repealed or modified § 1345, *supra*. This conclusion suggests that § 666 has a very limited coverage and is perhaps only procedural. It permits, but does not necessarily require, the United States being subjected to state jurisdiction.

II.

The Abstention Question

Having concluded that the United States District Court's jurisdiction was unimpaired, the issue remains whether, considering the character of the case, the District Court was correct in its abstention stance. The Conservation Districts together with the Board of Water Commissioners, State Board of Agriculture and the Colorado Game and Fish Commission assert, of course, that abstention was proper. The United States complains that the court's action was erroneous.

It has been recognized from very early times that federal courts are not to decline the exercise of expressly

granted jurisdiction. This principle was first expressed by Mr. Chief Justice Marshall in Cohens v. Virginia, 6 Wheat. 264, 404, 5 L.Ed. 257 (1821). This oft-repeated statement was that "We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given." On its face this concept conflicts with the abstention principle which is that federal courts in the exercise of a wise discretion are to restrain their authority because of scrupulous regard for the rightful independence of the state governments and for the smooth working of the Federal Judiciary. Railroad Commission of Texas v. Pullman Co., 312 U.S. 496, 61 S.Ct. 643, 85 L.Ed. 971 (1941).

A. *Guidelines*

It is, of course, fundamental that the doctrine of abstention is to be applied in narrowly limited special circumstances. *See* Zwickler v. Koota, 389 U.S. 241, 248, 88 S.Ct. 391, 19 L.Ed.2d 444 (1967) (citing Propper v. Clark, 337 U.S. 472, 492, 69 S.Ct. 1333, 93 L.Ed. 1480 (1949)). *See also* Lindsey v. Normet, 405 U.S. 56, 92 S.Ct. 862, 31 L.Ed. 2d 36 (1972); County of Allegheny v. Frank Mashuda Co., 360 U.S. 185, 79 S.Ct. 1060, 3 L.Ed.2d 1163 (1959); Meredith v. City of Winter Haven, 320 U.S. 228, 64 S.Ct. 7, 88 L.Ed. 9 (1943).

B. *Applicable Areas*

1. The Supreme Court placed it in perspective when it said that it is an extraordinarily narrow exception to the rule that a federal court has a duty to adjudicate a controversy presented to it over which it has jurisdiction. *See* County of Allegheny v. Frank Mashuda Co., *supra*, and *see* Meredith v. City of Winter Haven, *supra*. It is within this narrow scope that we examine the various cases which have applied the abstention principle.

One facet of the abstention doctrine is that which seeks to give a state court full opportunity to dispose of a case which is potentially governed by state law before entertaining it and deciding it as a constitutional law question. *See* Railroad Commission of Texas v. Pullman Company, *supra*, a case in which the parties being regulated sought an injunction against enforcement of an order of the state regulatory agency.

Ours is not a case which presents constitutional questions and state questions, both of which show capability for disposing of the case whereby the state decision could obviate the necessity for a constitutional law decision.

2. A second abstention category is exemplified in Burford v. Sun Oil Co., 319 U.S. 315, 63 S.Ct. 1098, 87 L.Ed. 1424 (1943), which holds that federal courts are not to interfere with state regulatory schemes; that they are to refrain from anticipating a constitutional question and interfering with the state regulatory agency when it is engaged in administering state law. *See* Alabama Public Service Comm. v. Southern Ry. Co., 341 U.S. 341, 71 S.Ct. 762, 95 L.Ed. 1002 (1951); Hawks v. Hamill, 288 U.S. 52, 53 S.Ct. 240, 77 L.Ed. 610 (1933); 1A J. Moore, Moore's Federal Practice § 0.203 [1]; C. Wright, Law of Federal Courts 200 (2d ed. 1970).

Here the federal court is not shortcircuiting or interfering with efforts of a state administrative regulatory system, whereby the *Burford* rule could operate.

3. A further recent application of abstention is in cases in which a novel and important issue of state law is presented. *See* Kaiser Steel Corp. v. W. S. Ranch Co., 391 U.S. 593, 88 S.Ct. 1753, 20 L.Ed.2d 835 (1968). *Kaiser* was a New Mexico eminent domain and water case. It concerned alleged inconsistency between a New Mexico statute and the New Mexico Constitution. Based on the fact that this was a novel and highly important question for the State of New Mexico, it was ruled that abstention was there appropriate. This holding was not dissimilar from Louisiana Power & Light Co. v. City of Thibodaux, 360

U.S. 25, 79 S.Ct. 1070, 3 L.Ed.2d 1058 (1959). *Compare* County of Allegheny v. Frank Mashuda Co., *supra*. The fact, however, that both *Kaiser* and our case involve water rights does not render *Kaiser* determinative.

C. *The Race to the Courthouse*

The Colorado litigants also argue strenuously that this cause must not be determined by who wins the race to the courthouse. This is a recurring contention in cases in which state and federal courts have concurrent jurisdiction over a property case. True, the race idea has no intrinsic attractiveness. At the same time, it must be recognized that priority of filing has validity in the situation in which concurrent jurisdiction exists. The priority of the court which first acquires jurisdiction over the subject matter is entitled to recognition, and where the plaintiff has selected the forum and has filed first, his right to try his case in that court is not to be lightly dismissed.

The priority principle is held to apply where a federal and state court have concurrent jurisdiction and the action is *in rem*. *See* Penn General Casualty Co. v. Pennsylvania, 294 U.S. 189, 55 S.Ct. 386, 79 L.Ed. 850 (1935); Kline v. Burke Constr. Co., 260 U.S. 226, 43 S.Ct. 79, 67 L.Ed. 226 (1922); Palmer v. Texas, 212 U.S. 118, 29 S.Ct. 230, 53 L.Ed. 435 (1909); Byers v. McAuley, 149 U.S. 608, 13 S.Ct. 906, 37 L.Ed. 867 (1893); Gay v. Brierfield Coal & I. Co., 94 Ala. 303, 11 So. 353 (1891); Crosby v. Spear, 98 Me. 542, 57 A. 881 (1904); Rogers & B. Hardware Co. v. Cleveland Bldg. Co., 132 Mo. 442, 34 S.W. 57 (1896); 20 Am.Jur.2d, Vol. 20 § 135, p. 485. And so the priority factor is entitled to be weighed in the abstention scale.

D. *Effect on Abstention of United States as Plaintiff*

We next consider (on the decision to abstain) the effect of the presence of the United States as a party plaintiff in the action. There is a dearth of authoritative case law

bearing directly on the point. The most helpful decision is that of the Supreme Court in Leiter Minerals v. United States, 352 U.S. 220, 77 S.Ct. 287, 1 L.Ed.2d 267 (1957). The essential issue in that case was whether the United States owned minerals on lands, the surface of which it owned. A private party had claimed the minerals in a state court action against the lessee of the United States. Thereupon, the United States filed an action in the United States District Court for the Eastern District of Louisiana. It sought to quiet title and to enjoin the adverse claimant in state court from prosecuting its action. The section of the Judicial Code which prohibits injunctions against State Court actions, 22 U.S.C. § 2283, was interposed. But the Supreme Court held that it was inapplicable to the United States when it was the suitor. In reaching this result the statute was ruled to be ambiguous and not susceptible to imputing congressional intent to make it applicable to the United States.[4] The Court went on to hold that it was proper for the District Court to entertain the suit in the federal court ". . . and to prevent the effectuation of state

[4] The reasoning of the Court was:

> There is, however, a persuasive reason why the federal court's power to stay state court proceedings might have been restricted when a private party was seeking the stay but not when the United States was seeking similar relief. The statute is designed to prevent conflict between federal and state courts. This policy is much more compelling when it is the litigation of private parties which threatens to draw the two judicial systems into conflict than when it is the United States which seeks a stay to prevent threatened irreparable injury to a national interest. The frustration of superior federal interests that would ensue from precluding the Federal Government from obtaining a stay of state court proceedings except under the severe restrictions of 28 U.S.C. § 2283, 28 U.S.C.A. § 2283, would be so great that we cannot reasonably impute such a purpose to Congress from the general language of 28 U.S.C. § 2283, 28 U.S.C.A. § 2283, alone.

352 U.S. at 225-226, 77 S.Ct. at 290-291.

court proceedings that might conflict with the ultimate federal court judgment." The Court's prior decision in United States v. Bank of New York & Trust Co., 296 U.S. 463, 56 S.Ct. 343, 80 L.Ed. 331 (1936) in which an injunction had been denied, notwithstanding the presence of the United States as a party, was distinguished on its facts. There, it was pointed out, the United States was one of many claimants to a fund and was not different from any other litigant. However, in treating the United States differently in *Leiter* it was emphasized that the policy (of exempting the United States from the anti-injunction statute) is more compelling where the United States seeks to advance a national interest.[5]

The presence of the United States as a plaintiff seeking to establish rights which have a national and sovereign character is then a factor which militates strongly against the applicability of abstention.

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[5] The opinion distinguishes the situation where the United States is "like any private claimant":

> Moreover, the Bank of New York case presented the more unusual situation where the United States, like any private claimant, made a claim against funds that it never possessed and that were in the hands of depositaries appointed by the state court. In this case, a private party is seeking by a state proceeding to obtain property currently in the hands of persons holding under the United States; the United States is seeking to protect that possession and quiet title by a federal court proceeding. Therefore, since the position of the United States is essentially a defensive one, we think that it should be permitted to choose the forum in this case, even though the state litigation has the elements of an action characterized as *quasi in rem*. We therefore hold that the District Court properly exercised its jurisdiction to entertain the suit in the federal court and to prevent the effectuation of state court proceedings that might conflict with the ultimate federal court judgment.

352 U.S. at 227-228, 77 S.Ct. at 292.

Finally, counsel for the appellees urge that the Supreme Court's decision in United States v. District Ct., County of Eagle, Colo., 401 U.S. 520, 91 S.Ct. 998, 28 L.Ed.2d 278 (1971) justifies the trial court's decision to abstain. We have carefully considered this case and we are of the view that it does not consider the problem which is presented in the case at bar. The United States there sought through writ of prohibition in the Colorado Supreme Court to prevent the District Court for Eagle County, Colorado, from asserting jurisdiction over it. This effort failed, but this case did not suggest a lack of jurisdiction of the federal district court in a suit instituted by the United States. Nor did it hold that the state court by virtue of § 666 had exclusive jurisdiction. Further, it did not hold nor even suggest that abstention by a federal court, the jurisdiction of which had been invoked, should be ordered.[6]

The judgment of the District Court is reversed and the cause is remanded for further proceedings consistent with the views expressed herein.

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[6] The Court was careful to note that reserved water rights of the United States "are federal questions which, if preserved, can be reviewed here after final judgment by the Colorado court." 401 U.S. at 526, 91 S.Ct. a 1003.

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

C-4497—Civil Action

UNITED STATES OF AMERICA, *Plaintiff*,

v.

AKIN, MARY, ET AL., *Defendants*.

Order

The Court's Bench Ruling on the 21st day of June, 1973 shall constitute the Order and Ruling in this action.

No additional Order will be entered.

DATED at Denver, Colorado, this 20 day of July, 1973.

BY THE COURT:

SHERMAN G. FINESILVER, Judge
United States District Court

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

Civil Action No. C-4497

Reporter's Transcript of Court's Ruling

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PROCEEDINGS:

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The Court: The Court is considering this matter as a Motion to Dismiss. The Court has been favored with very extensive briefs on the legal issues and the respective contentions. As this Court sees the posture of this case, this is a civil action filed by the United States in order to have its rights and the rights of the Ute Mountain Ute and the Southern Ute Indian tribe in and to the waters of the Mancos, the La Plata Animas, Florida, Los Pinos, Piedra, Navajo, and San Juan Rivers and waters tributary thereto in the State of Colorado determined and declared. The jurisdiction of this Court is invoked under 1345 of Title 28 of the United States Code. The action lists between a thousand and fifteen hundred defendants in the case depending on what time of day you make the counting and to what degree you figure some of the names. The defendants also include other unknown claimants of interest to the water in these rivers and tributaries.

• • •

The Court: This matter comes before the Court on the Motions to Dismiss or Reconsider in regard to—as filed by the defendants or intervenors in this case. Particularly, the defendants contest the jurisdiction of this Court to entertain the instant action and in any event, the defendants submit in general that the federal government should be compelled to proceed with this action in Division 7 of the state court or in the state courts.

The jurisdiction of this Court is purportedly invoked under Section 1345 of Title 28 United States Code. The plaintiff views this action as a suit in which the United States seeks to have its rights and concomitant priorities and the rights of the Ute Mountain Ute and the Southern Ute Indian tribes in and to the use of certain waters in the State of Colorado determined and declared.

The water in question is situate in the State of Colorado as described. At this time there are approximately 1,200 named defendants in this suit.

The Court views the following as the applicable law and statutes. First, the McCarran Amendment passed in 1952 designated as 43 United States Code Section 666 which provides for the joinder of the United States in a state court suit for the adjudication of water rights. Further the Water Rights Determination and Administration Act of 1969, Colorado Revised Statute 1963, Section 148-21-1 and other sections which provides a system for the adjudication of the waters of the natural streams in the State of Colorado. Also of considerable import is the case of *United States* v. *Eagle County,* 458 P.2d 760, 169 Colo. 555 which was affirmed by the United States Court, 401 United States 520, 91 S.Ct. 998, 28 L.Ed. 2d 278. Also the companuion case, *United States* v. *District Court in and for Division No. 5,* 401 U.S. 527.

A pivotal issue involved herein and one which is worthy of comment is the McCarran Amendment and its underlying intent coupled with the decision of the Supreme Court in the Eagle County case determined that the adjudication of such matters, that is, rights of the United States to the use of state waters, is solely a matter of state jurisdiction to the exclusion of the federal courts. This issue of jurisdictional exclusivity was not decided in the Eagle County case in the opinion of this Court or its companion case. Rather as we view these two authorities, the state court had jurisdiction under the McCarran Amendment and that

43 United States Code Section 666 (a) is an all-inclusive statutory provision that subjects to general adjudication in state proceedings all rights of the United States to water within the particular state's jurisdiction regardless of how the rights were acquired.

However, the nature and posture of this suit in the view of the Court does not necessitate that this Court make a determination as to the exclusiveness of jurisdiction of this matter. Rather the Court finds that the State of Colorado has a well-defined, workable system for adjudication of water rights of all claimants; that the United States is not immune from suit in the state courts and the United States, as it is presently doing in other water rights suits in the state courts of Colorado, apparently the United States has filed claims in Divisions 4, 5 and 6, should initiate action in the appropriate state court.

Further the Court also notes that the United States has either been served or is in the process of being served in Water Division 7, the district in which adjudication of the instant rights are located.

Although the intention of the McCarran Amendment and the Supreme Court decisions on the matter of exclusive jurisdiction are not manifestly clear, they nonetheless point out to our satisfaction that deferral of jurisdiction to state courts is justified when, as a practical matter, retention of federal jurisdiction on some claims would result in a piecemeal solution of a larger problem.

The Court perceives a practical approach in this case. Aside from the strict legal interpretations, the Court envisions that a practical approach must recognize that we would be creating a dual system of administration and decrees of water rights and potentially could require water users needlessly to readjudicate rights already decreed under state law. These water users have proximity to state courts and from a distance factor alone, there are

practical impediments to requiring everyone in this particular area to litigate the matter in the federal courts.

Further the Court is satisfied from a practical approach that this would be perhaps an unreasonable burden placed upon the citizens of Colorado and in attempting to locate individual water rights that the forums that are established through the state are recognized as a workable network of administration with considerable expertise under a body of state law that has been a hundred years in development and perhaps the system of priorities and propositions runs parallel to the history of the state and in fact is engrained in the Colorado Constitution. The court can see no practical argument in having or persuasive argument in having another forum exercise jurisdiction.

The question that has also been presented is that perhaps the federal courts are best equipped to interpret and adjudicate federal law. However, we are satisfied that the federal courts are not the only forums under the obligation to enforce federal law. In our opinion, we should entertain jurisdiction only after the state court with its well defined expertise and considerable embodiment of law over the years, have had the opportunity to address itself to the issues inherent in this litigation. We have the question of comity between the courts. This is intertwined with the question of abstention. As we view it, comity is based on the discussion that the state can adequately vindicate federal rights and when this assumption proves incorrect, the federal courts may then act in a proper case and under applicable constitutional and federal law.

The Court for a totality of the reasons expressed under the doctrine of abstention or by comity in recognition of the presence of applicable and workable state law, we are of the view the state forum can fully and adequately adjudicate the issues in this litigation, be they the national forests, the indian tribes or any other individual litigants.

To this end the Court is granting the defendants' Motion to Dismiss.

The Court reserves unto itself discretion and jurisdiction to enlarge this opinion in this bench ruling as necessary within the perod of 30 days and no appeal peroid will commence running until the end of that period. So it will not be necessary for the plaintiff, United States, in this case to file any Notice of Appeal. The Court will reserve unto itself a 30 days period in which to enlarge or modify this opinion. This does not mean that the Court, in fact, will do so. However, the Court will not consider this as a final judgment during this 30 day period.

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(Court in recess.)

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

Civil No. 4497

Complaint

UNITED STATES OF AMERICA, *Plaintiff*,

v.

Akin, Mary; Albright, Louis N.; Alexander, Clara; Allen, Whetsel; Ames, Margaret; Anderson, Luther; Anderson, Ralph; Anesi, Edith; Anesi, Louisa; Animas Consolidated Ditch Company; Animas Valley Ditch Company; Anixter, William R.; Annala, Roy L.; Archuleta, L. M.; Arizona Columbine Ranch, Inc.; Armstrong, Charles H.; Arny, Julian; Askins, H. Harry & Lillian Andrews; Aspen Springs Development Company; Aspen Trails Development Corporation; Aten, William & Ladeane; Atkinson, D. L.; Audas, W. L.;

Babcock, Kenneth; Bader, Clay; Baird, Brant; Baker, Mary; Baker, Mrs. Jack; Ball, W. P.; Bankston, Neil M.;

Balligu, Robert; Barclay, George & Veva E.; Barker, Earl, Jr.; Barker, Jentra J.; Barnes, Lloyd; Barnes, Pearl P.; Barnes, R. H.; Barnes, Holly G.; Pearl Barnes & Sons; Barr, Robert & Roberta; Barrett, Castle; Barrow, Hence; Bartel, Roland; Bauer, William; Beaty, John & Abenecio Munoz; Becay, Frank J. & Adeline J.; Bedford, Marie; Beebe, Gary; Beggrow, David R.; Beggrow, Dennis K.; Beggrow, William R.; Beighley, Harold V.; Belmear, Stanley T. & Elizabeth L.; Bement, Robert E. & Thelma F.; Bennet, Mabel; Benton, Jay M. & Alice H.; Berg, J. T.; Berryhill, Duane; Bettis, Willis; Bevten, Alta M.; Big Stick Ditch Company; Bigbee Brothers Cattle Company; Bingham, Elbert J. & Ruth A.; Bingham, Percy; Birdsill, Dottie J.; Bishop Brothers; Bixler, Charles A.; Blackmer, Fred C. & Helen M.; Blackmer, Pat; Blair, Frank; Blanding, Charles F.; Bloomfield, J. Vernon; Boclochoe, L. D.; Bodo, Michael; Bond, Tarlton; Bonds, R. V., Jr.; Bonds, Russell; Bowman, Willard O.; Bradford, Bryon; Bradshaw, Dean; Bradshaw, H.D.; Bramwell, Carl; Bramwell, Edwin; Brewer, Lester C.; Bridgewater, James & Cecilia; Brown, Antonio J.; Brown, George; Brown, Hazel; Brown, J. C.; Brown, Joe; Brown, Marvin C.; Brown, Naomi Carter; Brown, Raymond T.; Brown, Roy; Brown, Warren J.; Brixey, J. A.; Bryan, F. W.; Burkhard, Merton, Burkhard, Morton; Burnham, Clinton; Bernett Construction Company; Butler, Byron C.; Butler, Leona Easter; Bynum, James;

Caddy, Glenn; Calco Mining; Calhoun, Clarence; Calloway, Sam; Calvin, Ross, Jr.; Campbell, Charlie; Candelaria, Ed; Candelaria, Isiah; Candelaria, Sam; Carleno, Donald L.; Carmody, H. C., Inc.; Carpenter, G. R.; Carpenter, N. E.; Carver, John; Catchpole, Harvey; Caulk, Garland; Chapman, Vincent P. & Linda J.; Charles, Carroll; Chavez, Adolph; Chavez, Ben; Chavez, Dan; Chromo Mercantile; Chromo Ranches, Inc.; City of Dove Creek; City of Durango; City of Rico; Cladwell, E. H.; Clark, Emilie; Clark, Henry B.; Clark, Rosamond B.; Claude Decker Subdivision; Clever, Don W. & Viola G.; Cline, Fred; Cloman, James; Cogburn, Blanton & Lucille E.; Cogburn, D. F.; Cogburn, Foy; Colbert, Tom; Colescott, Ralph R. & Llyn P.; Collier, Burlson; Colorado Game & Fish Commission; Colorado Land Management; Comisky, Doris D.; Comyford, Carl F.; Connelley, Ruben; Conrad, Walter; Constant, Jack A.; Cook, Joseph D., Jr.; Cook, Willie M.; Cooper, Charlie B. & Bernice F.; Cooper, Howard; Cooper, Ted; Coppinger, R. B.; Corbett, Allison; Cordalis, James T.; Cordova, Marion; Cortez Cattle Company; Cotten, John E.; Cotten, Patrick C.; Couch, Derrel L. & Rosemary; Cox, Ira; Cox, Lee; Craig, Grace; Craig, Kenneth; Crawford, Allen; Crawford, Gwendolyn B.; Cresto, T. A.; Crow, A. M.; Crowley, Bernice; Crowley, Irwin R.; Crowley, Olen; Cugini, Duane; Currie, A. B.;

D. & R. G. W. Railroad; Dalabetta, Angelo; Dale, Marvin; Dale, W. W.; Daniels, Clyde L.; Dannels, Edith A.; Daniel, Eldridge B. a/k/a E. B. Daniel & Lenoria Daniel; Daulton Sealey Cattle Co.; Daulton, Glenn; Daulton, Mrs. Ted; David, George; Davies, Charles; Davis, Clarence; Davis, Phillip; Decker, Bill; Decker, Claude A.; Deering, Claude; Delzell, Robert W.; Denny, A. Wayne; Dickens, M. R.; District 30; Dittmar, Joseph E.; Dixilyn Corporation; Dobbins, Arthur; Dobbins, Hall; Dobbins, Jacqueline; Doerfer, Lloyd; Dolese, Mrs. Roger; Dorsett, Alton; Dove Creek, City of; Dowler, Alton D.; Doyle, Gwynevere Marrs & Nell; Dugger, Wayne; Dunagan, Illamae; Duncan, Raymond T.; Dunlap, Wesley V. & Elizabeth H.; Dunnagan, Ila Mae; Dunsworth Cabin Sites, Durango Ski Corporation;

Eaklor, Harry & Winona C.; Ealum, Ury L. & Betty Jo; Easter, L. B. & Cheryl H.; Eaton International Corporation; Echo Ditch Company; Eddie, Clifford; Eddy, J. T.; Edmonson, Elizabeth; Edwards, Roger W. & Rose A.; Eggleston, T. W.; Ellis, Darrel; Ellis, Vernon; El Paso Gas Company; Elkins, Mark; Englehart, Charles D.;

Englehart, Cordia; Engler, Harry; English, Leroy; Eoff, W. S. & Zoe L.; Erwin, Paul R.; Evans, Emmit B.; Evarts, Kathryn Russell; Everett, Larry; Everett, Leroy;

Fair Field Farms, Inc.; Farrow, Wayne; Fassett, Bruce; Fassett, Delwin; Faverino, Mike; Feazel, Betty; Feazel, Elizabeth T.; Fellers, C. C. & Dorothea; Fisher, Adrian G. & James C.; Fitzhugh, Alvin C.; Fletcher, A. R.; Florida Canal Enlargement Company; Florida River Estates; Florida Water Conservative District; Ford, Thomas R.; Ford, Tom; Folsom, Wade C. & Pearl G.; Forest, Melvin; Formwalt, Hood; Frahn, Alfred; Fraley, B. J.; Frame, Ross; Frazier, Bob; Frazier, J. W.; Fredricks, Arnold; Friend, C. H.; Fritz, Walter G. & Bertha Mae; Frizell, Frank; Frizell, T. J.; Fuches, Harley F.;

Gafford, Douglas D.; Gale, Josephine; Gallegos, Helen; Gallegos, Jose G.; Gallegos, Tom & Margarite Lopez; Galloway, Elynor Sue & Daisy; Gardner, J. T.; Gardner, Jewell; Gardner, Jewell L.; Gardner, Olivia; Gardner, Robert H.; Garnand, Dave; Garrett, Dan; Garrison, Violet; Gawith, Ann; Gawthrop, Lillian; Gawthrop, Rapp; Gibbs, Warren; Gibson, Eldon; Gibson, Irene; Gilliland, Tom; Gilmore, George; Gilmore, Ward; Girard, Louis E.; Girardin, Louis; Gladden, Allie J.; Godfrey, Delmar; Gomez, Chris; Goodman, David; Grace, Mary; Gray, Frank; Green, Houston; Green, Johnie; Greenlee, Howard; Greer, Harry H.; Greer, Lila; Gregg, J. Floyd & Bettie L.; Grevey-Lieberman Inv. Co.; Griffith, Gardner & Stevens; Grimes, B. H. a/k/a Grimes, Bill H.; Grives, J. L.; Grubbs, H.; Grutzmacher, Charles C.; Gurley, C. E.; Guy, Charles;

Haas, Al; Hall, Foster; Halls, Harry; Halverson, Harold; Halverson, Leslie; Hamblin, Kenneth M.; Hamilton, W. E.; Hampton, Edward B. & Rose E.; Hand, Robert; Hanning, Ollie; Happy Scenes Water System; Hare, Alex; Harmon, Fred; Harris, C. C.; Harris, David A.; Harris, Don; Harris, Donald; Haun, M. D. & Maggie Lee; Hawkins,

Herbert; Hayes, John T. & Belle M.; Haynie, Ralph; Haynie, Delph V.; Hays, John; Hays, U. J.; Henderson, R. J.; Henes, Walter; Henshaw, Wesley; Herschy; Hess, Lloyd; Hesselgrave, Robert M.; Hetherton, Jack; Hicks, James; Higgins, Allen Denton; Highfill, Robert W.; Hillen, Mollie A. & Roger H.; Hillyer, Oswen N. & Violet M.; Hinger, Charles C.; Hoff, Emo Gene; Holaday, Carl D.; Holgate, Merle; Holton, Walter B.; Holzraf, Conrad; Hood, Louis; Hopper, Hazel M.; Hott, Daily; Hott, R. D.; Hotter, Joe; Hughes, Beverly; Hughes, Bill; Hughes Brothers; Hughes, Chas. J.; Hughes, Jack (Estate); Hughes, John; Huntington, C. W.; Huntington, Lawrence; Hurt, Oliver; Hutchinson, E. L.; Hyde, Bert; Hyde, Leola; Hyde, Wade H.; Hyder & Hyder Ranch;

Isgar, Arthur; Ismay, Eugene; Ismay, John;

Jackson, Charles E.; Jackson, William F.; James, David; Jaques, Manuel M.; Jarvis, J. W. (Estate); Jarvis, Marion H.; Jarvis Estate; Jasper, Davden; Jeckel, H. M.; Jeffrey, Dorothy H. & Stephen J.; Jenkins, Marion E. & Louise M.; Johnson, Charles; Johnson, Curtis; Johnson, Cy; Johnson, Eugene; Johnson, Robert A.; Jones, Chris H. & Effie; Jones, James; Jones, Robert F. & Dorothy May; Joyner, Jerry L. & Helen I.; Jutten, John; Jutten, W. W.;

Kahn, William; Keahey, P. F.; Keane, Johnny; Keeler, Rex; Keen, William L. S. & Mildred C.; Kelly, Pauline; Kenagy, Paul E.; Kern Acre Real Estate; Kerr, John; Kikel, Joe; King, Arthur; Kine, Ed; King, John; Kingery, C. A.; Kleckner, Carl; Knowlton, Henry; Knuckles, Glen; Knutson, D. C.; Koenig, Carl; Koenig, Ruby K.; Kolz, Alvin; Koshak, Stanley; Kroeger, Jack; Kroulik, Charles; Kruger, John; Kruger, N. J.; Kuenzler, William; Kugle, Kris F.; Kuhlman, Gordon;

Lake, Lawrence; Lancaster, Perry; Lapp, Conrad; Las Tres Piedras, Inc.; Laws, Henry & Leatha; Lechner, Erwin; Lechner, Ervin; Lechner, Irwin A.; Lechner, John;

Lechner, Joseph A.; Lee, Brice F.; Leigh, Royal Archie; Leighton, Robert; Leister, D. B.; Lemon, Charles; Lenard, Joseph; Leonard, Cathryine R.; Leonard, M. H.; Le Platt, H. J.; Lewis, Loyd; Lichliter, Roy; Light, Arthur E.; Lincoln, Francis; Linger, Earl O.; Linsey, Lester; Lippert, Robert; Little Navajo Diversion Canal Co.; Little, Scott, Mrs.; Lohr, Edward G.; Long, J. Kenneth & Elanor J.; Longenbauch, Harry; Longengaugh, H. H.; Longengauch, Robert L.; Lopez, Margarite; Los Pinos Irrigation Ditch Company; Lucero, Joe; Luchini Ranch; Luchini, Louis; Ludwig, Frank, Jr.; Lukas, Robert L.; Lunt, Wayne J.; Lynn, William P.;

M. V. I. D.; Macht, H. Ray; Mackey, Stewart B.; Macy, Tilton; Majors, Donald K.; Mancos Water Cons. Dist.; Marach, L. H. & May E.; Marcact Investment; March, Willard; Martinez, Eugene; Martinez, Fred J.; Martinez, Jesus; Martinez, Jesus M.; Martinez, Manuel E. & Lydia; Martinez, Mel; Martinez, Reynel; Martinez, Victoria G.; Masanz, Paul J. & Jean L.; Masco Brothers; Masco, Charles; Masco, John; Masanz, Paul; Mason, Isabel; Mayfield, James F.; McAfee, Bruce; McCaleb, Joe; McCabe, Vance; McCall, Charlie; McCall, Charles R. & Hazel; McCarthy, Daniel; McCaw, Robert; McCaw, Leroy; McClain; McClure, Don; McConaty, Beverly Brown Hughes; McCormick, Robert; McCoy, Clarence; McEwen, Leucian; McEwen, Noel & Mary J.; McGilvray, M. W.; McInnes, Lewis & Vera M.; McIntyre, W. Fred; McNamara, John; Mekar, Junnie L.; Melvin, C. L.; Menaldino, Victor; Merger Mining & Milling; Mesa Verde Company; Messinger, Wester & Vester; Meyer, Otto & Alma; Michels, Wilford; Mignerey, Lester L., Sr.; Mignerey, Lester L., Jr.; Mignerey, Arthur C.; Millard, Arthur; Millard, Mary Jane; Miller Brothers; Miller, J. T.; Miller, Jesse; Miller, John; Milo, Hanstedt; Minor, Harmon; Minor, H. E.; Minor, H. E., Jr.; Miser, Martin; Mod Dairy, Inc.; Mohar, Jennie Lee; Montezuma Plywood Co.; Montezuma Valley

Irrigation Company; Montezuma Water Company; Montoya, Louis; Montoya, Modesto; Montroy, Leon; Morgan, Jean; Morris, Vincent; Morrison Consolidated Ditch Co.; Munoz, Abenecio; Munoz, Daniel; Munyon, William L. & Jona A.; Mustian, Dorthea; Myers, Ron;

Nanna, Sylvester M.; Necchi, John; Nelson, Charles; New Mexico Game & Fish; Newbold, Jack; Newbold, Jack G.; Newton, Mrs. Horace; Nickles Brothers; Nielson, Dick; Neilson, G. L.; Noland, Owen & Gertrude; Nord, Warren E. & Myrtle S.; Norton, James;

O'Brien, Eva; O'Brien, Robert W.; O'Brien, Rosemary; Oliver, Troy; Ortiz, Bill; Ortiz, Modesto; Oseola Metals Corporation; Osterhoudt, Walter & Gretchen; Overstay, Robert; Owens, Emmit & Lillie May; Oxley, Grant;

Palmer, S. B.; Pargin Brothers; Parks, Grace; Parmley, D. E.; Parmley, Harry; Patten, James S. & Margaret E.; Patten, Meredith Lynn; Patterson, Ross D. & Betty J.; Paulek, Debs; Paulek, Grant; Paulek, Margurite; Paulek, V. A.; Paxton, George; Pecis, Fred; Peck, Jack D.; Penn, William; Penny, Norris R.; Perez, Gloria; Perkins, Calvin J.; Periman, R. T.; Perry Barnes & Sons; Peterson, Jack; Petry, Albert; Phelps, J. W., Jr.; Piccoli, Tony; Picker, George B. & Maxine S.; Pierce, Arthur; Pinckert, Robert L.; Pine River Cattle Co.; Pine River-Bayfield Ditch Company; Pine River Irrigation District; Pinckert, Robert; Pittsburg and Midway Coal Mining Company; Plumb, Fred B.; Poma, Victor A. & Ethel I.; Porter, C. C.; Porter, Verna Dell; Potter, Shelly; Price, Hubert; Price, Thomas W. & Pearl; Prickett, Don; Prince, Herbert D. & Hazel L.; Proctor, Robert F. & Phoebe I.;

Quintana, Joe E.; Quintana, Rose B.;

Radcliff, Clarence C. & Lucille; Radcliff, Harold; Rae, Irene; Ragsdale, John F.; Rainwater, Carl; Ralls, Roy; Randell, Dell; Randolph, Emery, Jr.; Rea, Earl; Rea, Paul Sidney & Irene M.; Read, Max; Red Mesa Reservoir

& Ditch Company; Reddert, F. E.; Reddert, Lee; Redman, Elmer & Pauline; Reed, Max; Reeder, Charles; Reibsomer, Mildred; Retherford, Roy J.; Reynolds, R. J.; Ricca, Bernard; Richards Inc.; Ridley, William, Rietveld, William & Marion Louise; Riffey, Arnold; Riggot, Harold; Ritter, John W. & Maurice T.; Robb, Arlo T.; Robbins, Clarence; Robbins, Ralph; Robinson, Fred B. & Velma; Roberson, R. L.; Roberts, Gene; Roberts, Lee M.; Roberts, Leighton G. & Jo Estelle; Roberts, Leo M. & Constance C.; Roberts, W. W.; Robinson, Blue; Robinson, Ronald; Roelfs, E. R.; Rogers, Charlie M.; Rogers, Wayne; Roscio Brothers; Rose, Troy & Ione; Roundy, Elbert; Rowe, William; Rudd, Clayton; Runyan, Charles E.; Ryberg, William;

Safely, Martin P.; Salmon, Joe; Sambrite Cattle Co.; San Juan Branch Exp. Station; San Juan River Land Development Company; San Juan River Resort, Inc.; Sanderson, Loran; Sandford, Thomas A.; Saunders, Roy H.; Savidge, Robert B. & Margaret E.; Sayles, Phillip A.; Schaffenacker, Austin W.; Schaffer, Roscoe; Schick, Gene; School District 11 Joint; Schmitt, John; Schroeder, P. H.; Schutz, Harold; Scott, R. G.; Scott, Sandy; Self, Raymond G.; Seal, Ben; Searle, Ed; Semler, Paul G.; Semler, W. E.; Shahan, George; Sheek, Clyde; Sheperd, Roy; Shepperd, Sidney; Sherritt, Paul H.; Sherwood, Pat; Sherwood, Patricia A.; Shillingburg, Mrs. Condon G.; Shober, Joe F. & Grace V.; Shock, Lawrence, J.; Short, George; Short, Lester A. & Kathryn; Short, Merl; Short, Neil; Short, Oran W. & Vera S.; Short, W. Alva; Shull, Ethel; Shultz, H. R.; Shunway, Charles; Shuster, Robert; Shwan, Joe; Silliman, Doyl; Simmons, John L.; Sisson, Ruby; Sittner, E. O.; Slade, F. B.; Smith, Allen; Smith, Dale & Carolyn; Smith, Mark; Snow, Nellie; Snyder, Charles; Snyder, Robert L.; South Durango Water District, Southwest Properties, Inc.; Southwestern Water Conservation District; S. W. Water Conservancy Board;

S. W. Water Conservancy District; Sowers, Fred E., Speer, W. E.; Spencer, Olen; Sponsel, George; Springer, Harold A. & Ruth; Spurlock, Pat; Stall, Earl; Standard Metals Corporation; State Board of Agriculture; State of Colorado Division of Fish, Game & Parks; Stephens Development & Management Corp.; Steward, Chistery; Stewart, Wayne; Stinson, Jim; Stocker, Harold Edward & Barbara J.; Stone, Wendell L.; Stovall, Robert; Stratton, Albert; Stricklin, Jack M.; Strobel, Merle; Strobel, Ralph; Suckla, Jim; Sullivan Ditch Company; Summit Irrigation Co.; Summit Reservoir & Irrigation Co.; Sutton, Leslie D.; Swanemyr, Mary; Sylvia, Marjorie A.;

Talamante, Frank; Talley, Dale; Taylor, Catherine; Taylor, Christine; Taylor, Ellis; Taylor, Bob K.; Teal, Frank; Teeson, Mrs. Vada; Tenyck, J. W.; Terrill, Charlie C.; Therioet, Ed; Thomas, Fredrick P. & Nancy E.; Thomas, Mr. & Mrs. Mark; Thomas, Wallace; Thomas, Walter; Thompson, Art & Donna Lee; Thompson, Bert & Helene L.; Thompson, Burt; Thompson, Chester; Thompson, Emily M.; Thompson, Emma; Thompson, Elmer, Thompson, Martha M.; Thompson-Epperson Ditch Company; Tiday, Ronald L.; Tinker, John; Tinker Helen; Tinker, Ruben; Toelle, Frances B.; Toner, Archie B.; Town of Cortez; Town of Dolores; Town of Rico; Town of Silvertown; Tres Piedras, Inc.; Trimble, Garland E.; Trujillo, E. R.; Truelson, Lowell & Olive; Truelson, Val; Turner, Richard W. & Claudine B.; Turner, Richard W., Jr.; Turner, W. B.;

Underwood, R. Lincoln; Union Carbide Corporation; United States Smelting, Mining & Refining; Usher-Prescott Southside;

Valdez, Gilbert; Valdez, Joe G.; Valdez, Jose G. & Juan J.; Vanderville, Emil; Veach, Lillian A.; Velasquez, Abel; Vencil, William & Liar; Villareal, Augustine; Van Feldt, Herbert J.; Vye, Time E.;

Wade, J. H.; Wageman, Robert M.; Wagner, Roy R.; Wagoner, Clarence; Walker, James; Walker, Jimmy; Wallace, Dwight; Wallace, Geraldine; Wallace, Walter; Wampler, Harold E. & Mary A.; Warner, Addison W.; Waters, Robert; Watkins, Robert J. & Ruth F.; Weavel, Harlson; Weaver, C. J.; Weaver, Harlson; Weber Reservoir Company; Weiland, Ernest C.; Weimeyer, Ron; Welding Service & Supply; West, Walter C. & Stella M.; Western Colorado Power Company; Western Construction & Development Company; Weston, Carl R. & Jeanne; Wheat, Don R.; Wheeler, A. L.; Wheeler, Ralph; White, Frances; Whyman, R. G.; Wicker, Elden Z.; Wightman, Howard; Wilburn, Frank; Wiley, Milton; Wilkerson, J. T.; Williams, Alton; Williams, B. F.; Williamson, H. F.; Williams, Susan B.; Wilson, David E.; Wilson, Glen & Mary T.; Wilson, Roberta; Winkler, William; Wolfswinkel, Clifford L.; Wommer Frank; Wommer, Edwin C.; Wood, Rev. J. C.; Wright, Charles A.; Wyman, David M.; Wyman, Daniel; Wynn, E.;

Young, Dale; Young, J. P.; Young, Price Pierce; Young, Agenes Therese;

Zwicker, Eldon;

All unkown claimants of interest to water in the Mancos, La Plata, Animas, Florida, Las Pinos (Pine), Piedra, Navajo and San Juan Rivers and waters tributary thereto in the State of Colorado.

Defendants.

I.

This is a civil action in which the United States seeks to have its rights and the rights of the Ute Mountain Ute and Southern Ute Indian Tribes in and to the use of the waters of the Mancos, La Plata, Animas, Florida, Los Pinos (Pine), Piedra, Navajo, and San Juan Rivers and waters tributary thereto in the State of Colorado, determined and

declared. The jurisdiction of this court is invoked under Section 1345 of Title 28 of the United States Code.

II.

The members of the Ute Mountain Ute Indian Tribe live on the Ute Mountain Ute Reservation, which is located in the southwest corner of the State of Colorado. The present reservation was part of a larger reservation which was withdrawn from the public domain and reserved for the use of said Indian Tribe by the Ute Reservation Treaty of March 2, 1868. When said lands were reserved for Indian use, waters in and on said lands were withdrawn from private appropriation as against the United States and reserved for use of the Indian Tribe. The United States, on behalf of the Ute Mountain Ute Indian Tribe, claims rights in and to the use of the waters of the Mancos and San Juan Rivers and waters tributary thereto in the State of Colorado, located on said reservation; including surface, ground, and underground waters which were unappropriated on March 2, 1868, and which are or will become reasonably necessary for the present and future needs of the Indians in fulfillment of the purposes for which the reservation was created.

III.

The members of the Southern Ute Indian Tribe live on the Southern Ute Reservation which is located in the southwest corner of the State of Colorado. The present reservation was part of a larger reservation which was withdrawn from the public domain and reserved for the use of said Indian Tribe by the Ute Reservation Treaty of March 2, 1868. When said lands were reserved for Indian use, waters in and on said lands were withdrawn from private appropriation as against the United States and reserved for use of the Indian Tribe. The United States, on behalf of the Southern Ute Tribe, claims rights

in and to the use of the waters of the La Plata, Animas, Florida, Los Pinos (Pine), Piedra, San Juan and Navajo Rivers and waters tributary thereto in the State of Colorado, located on said reservation; including surface, ground, and underground waters which were unappropriated on March 2, 1868, and which are or will become reasonably necessary for the present and future needs of the Indians in fulfillment of the purposes for which the reservation was created.

IV.

Mesa Verde National Park is owned by the United States and is located within the watershed of the San Juan River and its tributaries in the State of Colorado. The lands comprising this National Park were reserved for National Park purposes on June 29, 1906, 34 Stat. 616, 617; June 30, 1913; 38 Stat. 83; February 26, 1931, 46 Stat. 1422, and December 23, 1963, 77 Stat. 473. When these lands were reserved, the unappropriated waters in and on said lands were withdrawn from private appropriation as against the United States and were reserved for use by the United States to the extent necessary for the requirements and purposes of said reservation.

V.

The Yucca House National Monument is owned by the United States and located within the watershed of the San Juan River and its tributaries in the State of Colorado. The lands comprising this National Monument were reserved for National Monument purposes on December 19, 1919, by Presidential Proclamation 1549, 41 Stat. 1781. When these lands were reserved, the unappropriated waters in and on said lands were withdrawn from private appropriation as against the United States and were reserved by the United States to the extent necessary for the requirements and purposes of said reservation.

VI.

The Hovenweep National Monument is owned by the United States and located within the watershed of the San Juan River and its tributaries in the State of Colorado. The lands comprising this National Monument were reserved for National Monument purposes on March 2, 1928, by Presidential Proclamation No. 1654, 42 Stat. 2299. When these lands were reserved, the unappropriated waters in and on said lands were withdrawn from private appropriation as against the United States and were reserved for the use by the United States to the extent necessary for the requirements and purposes of said reservation.

VII.

The United States owns certain lands within the watersheds of the Mancos, La Plata, Animas, Florida, Los Pinos (Pine), Piedra, Navajo, and San Juan Rivers and their tributaries in the State of Colorado, which are administered by the Bureau of Land Management in accordance with Executive Orders, Acts of Congress, and rules and regulations promulgated by the Secretary of the Interior. The United States claims the right to the use of waters on these lands to the extent these waters have been used with priority dates as of the dates of initiation of the various uses.

VIII.

The United States claims reserved water rights in and to public waterholes and springs located within the watersheds of the Mancos, La Plata, Animas, Florida, Los Pinos (Pine), Piedra, Navajo, and San Juan Rivers and their tributaries in the State of Colorado, which were reserved for public watering purposes on April 17, 1926, pursuant to the Act of December 29, 1916, 39 Stat. 865, as amended.

IX.

The United States claims a right to the use of waters in hot springs and other waters located within the watersheds of the Mancos, La Plata, Animas, Florida, Los Pinos (Pine), Piedra, Navajo, and San Juan Rivers and water tributary thereto in the State of Colorado, which contain curative properties, and which were withdrawn from private appropriation on July 7, 1930, pursuant to the Act of March 3, 1925, 43 Stat. 1133.

X.

Under authority of the Reclamation Act of June 17, 1902, 32 Stat. 388, Reclamation projects have been initiated within the watersheds of the Los Pinos (Pine), Florida, La Plata, and Animas Rivers, and water tributary thereto, in the State of Colorado. These projects are: Pine River Project, having an initiation date of November 13, 1935; the Lemon Reservoir of the Florida Project, Colorado, having an initiation date of June 10, 1936; the Florida Project Enlargement of the Florida Farmers Ditch, having an initiation date of June 5, 1946; and the Animas-La Plata, Colorado Project, having an initiation date of September 2, 1938. The United States claims priority dates for these projects as of the dates they were initiated as set forth above. The uses claimed include *inter alia;* irrigation, stockwatering, industrial manufacturing, municipal, power generation, piscatorial, recreation, flood and erosion control and wildlife propagation and preservation.

XI.

The United States owns lands in the State of Colorado that comprise the reservation presently known as the San Juan National Forest. These lands were reserved for National Forest purposes by the following: Presidential Proclamation 567, June 3, 1905; Presidential Proclamation 575, June 13, 1905; Presidential Proclamation 736,

March 2, 1907; Presidential Proclamation 737, March 2, 1907; Executive Order 886, July 1, 1908; Executive Order 889, July 1, 1908; Presidential Proclamation 1076; August 15, 1910; Presidential Proclamation 1078, August 15, 1910; Executive Order 3485, June 10, 1921; Presidential Proclamation 1841, July 6, 1928; and Public Land Order of August 19, 1947. When these lands were reserved for National Forest use, the waters in and on said lands were withdrawn from private appropriation as against the United States and were reserved for use on said lands by the United States to the extent necessary for requirements and purposes of the reservation.

XII.

The United States claims rights in and to the use of so much of the waters of the Mancos, La Plata, Animas, Florida, Los Pinos (Pine), Piedra, Navajo, and San Juan Rivers and waters tributary thereto in the State of Colorado, as is or may become necessary for the requirements and purposes of said reservation having priority dates as of the dates of the various acts of Congress, Presidential Proclamations, Executive Orders and Public Land Orders which reserved these National Forest lands.

XIII.

On October 25, 1930, a decree was entered in the case entitled *United States* v. *The Morrison Consolidated Ditch Company, et al.,* Equity No. 7736, in the District Court of the United States for the District of Colorado. This action was a suit, *inter alia,* for an adjudication of certain Indian rights to the use of waters of the Pine (Los Pinos) River in the State of Colorado. It was not, however, a complete stream adjudication. In this adjudication, rights to the use of approximately two hundred twelve (212) second feet of water from the Pine (Los Pinos) River and one (1) second foot of water from Dry

Creek, a tributary of the Pine River, were decreed for use on the Southern Ute Indian Reservation. This water was to be used for "necessary economical and beneficial irrigation and for domestic purposes" for some sixteen-thousand nine-hundred sixty-six (16,966) acres of irrigable land on the "former Southern Ute Reservation," but diversions were not to be in excess of one (1) second foot of water for each eighty (80) acres of land actually being irrigated. No determination was made in said decree as to water rights of the Indians for purposes other than irrigation and domestic uses. No determination was made as to other Federal rights to the use of waters of the Pine (Los Pinos) River. Without a determination by this Court of the legal effects of the Pine River decree upon rights and uses not asserted and not at issue in that action, and not mentioned in that decree, and upon the relative priorities as between decreed rights and rights and uses not covered by the decree, the United States cannot properly determine its rights in and to waters of the Pine River.

XIV.

The defendants and each of them claim rights in or rights to the use of the waters of the Mancos, La Plata, Animas, Florida, Los Pinos (Pine), Piedra, Navajo, and San Juan Rivers and their tributaries in the State of Colorado, which rights are adverse to and jeopardize the rights of the United States and the Ute Mountain Ute and Southern Ute Indian Tribes. All users of the aforementioned waters are necessary parties to this action.

WHEREFORE, Plaintiff prays:

1. That each and all of the defendants be required to appear before this court and set forth fully their claims in and to the use of the waters of the Mancos, La Plata, Animas, Florida, Los Pinos (Pine), Piedra, Navajo, and

San Juan Rivers and waters tributary thereto in the State of Colorado.

2. That the court determine and decree that the United States holds for the benefit of the Ute Mountain Ute Tribe of Indians the right to divert and use so much of the waters of the Mancos and San Juan Rivers and waters tributary thereto in the State of Colorado, located on the Ute Mountain Ute Indian Reservation, as is or may become reasonably necessary for the needs of said Ute Mountain Ute Tribe of Indians, in fulfillment of the purposes for which the reservation was created, and that such right be declared to have a priority date of March 2, 1868.

3. That the court determine and decree that the United States holds for the benefit of the Southern Ute Tribe of Indians the right to divert and use so much of the waters of the La Plata, Animas, Florida, Los Pinos (Pine), Piedra, San Juan and Navajo Rivers, and waters tributary thereto in the State of Colorado, and located on the Southern Ute Indian Reservation as is or may become reasonably necessary for the needs of said Southern Ute Tribe of Indians, in fulfillment of the purpose for which the reservation was created, and that said rights be declared to have a priority date of March 2, 1868.

4. That the court determine and decree that the United States has the right to the use of so much of the waters of the Mancos, La Plata, Animas, Florida, Los Pinos (Pine), Piedra, Navajo and San Juan Rivers and waters tributary thereto in the State of Colorado, in and on the San Juan National Forest lands within the watersheds of the aforementioned rivers as is or may become reasonably necessary for the needs and purposes of such National Forest lands, and that such right be declared to have priority dates as of the dates these lands were reserved for National Forest use.

5. That the court determine and decree that the United States has the right to the use of so much of the waters in

the watershed of the San Juan River and its tributaries in the State of Colorado, in and on the lands of Mesa Verde National Park as is or will become reasonably necessary for National Park purposes, with priority dates as of the dates these lands were reserved for National Park purposes.

6. That the court determine and decree that the United States has the right to the use of so much of the waters within the watershed of the San Juan River and its tributaries in and on the lands of the Yucca House National Monument, as is or will become reasonably necessary for National Monument purposes and uses, with a priority date of December 19, 1919.

7. That the court determine and decree that the United States has the right to the use of so much of the waters within the watershed of the San Juan River and its tributaries in the State of Colorado in and on the lands of Hovenweep National Monument, as is or will become reasonably necessary for National Monument purposes and uses, with a priority date of March 22, 1923.

8. That the court determine and decree that the United States has the right to the use of waters within the watersheds of the Mancos, La Plata, Animas, Florida, Los Pinos (Pine), Piedra, Navajo and San Juan Rivers and waters tributary thereto in the State of Colorado, on public lands where the waters have heretofore been put to beneficial use on those lands, to the extent of such use, and with priority as of the dates the use of such waters were first initiated.

9. That the court determine and decree that the United States has rights in and to public waterholes and springs located within the watersheds of the Mancos, La Plata, Animas, Florida, Los Pinos (Pine), Piedra, Navajo and San Juan Rivers and waters tributary thereto in the State of Colorado, which were reserved for public watering

purposes on April 17, 1926, pursuant to the Act of December 29, 1916, 39 Stat. 865, as amended, with a priority date of April 17, 1926.

10. That the court determine and decree that the United States has rights in and to certain hot springs and other waters located within the watersheds of the Mancos, La Plata, Animas, Florida, Los Pinos (Pine), Piedra, Navajo, and San Juan Rivers and waters tributary thereto in the State of Colorado, which contain curative properties, with a priority date of July 7, 1930.

11. That this court confirm the rights of the United States to the use of the waters within the Los Pinos (Pine) River watershed and its tributaries in the State of Colorado for the Pine River Reclamation Project with a priority date of November 13, 1935.

12. That this court confirm the rights of the United States to the use of waters within the Florida River watershed and its tributaries in the State of Colorado, for the Florida Project, Lemon Reservoir with a priority date of June 10, 1936, and for the Florida Project, Enlargement of the Florida Farmers Ditch, having a priority date of June 5, 1946.

13. That this court confirm the rights of the United States to the use of waters within the Animas River and La Plata River watersheds and their tributaries in the State of Colorado, for the Animas-La Plata, Colorado Project with a priority date of September 2, 1938.

14. That the court interpret, determine, and decree the legal effect of the case entitled *United States* v. *Morrison Consolidated Ditch Company, et al.*, Equity No. 7736, in the District Court of the United States for the District of Colorado, decided October 25, 1930.

15. That the court enter its order enjoining all of the diversions and uses of the waters adjudicated herein except

in accordance with the rights and priorities as set forth in the Court's decree.

16. That the court appoint a Water Master to administer the waters adjudicated herein and the respective rights of all users therefrom, all in accordance with the orders and directives of this court.

17. That the court enter such further orders and decrees as may be just and proper for an adjudication of the parties' rights to the use of the waters adjudicated herein.

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